

No. 122566

In The
SUPREME COURT
Of The State of Illinois

JENNIFER N. NERE)	Petition for leave to Appeal
)	
)	
Petitioner- APPELLANT-Defendant)	On Appeal from Appellate Court, Second District, Case No. 2-14-1143
)	There heard on Appeal from Court of the 18 th Judicial Circuit of DuPage County, Illinois
)	No. 13 CF 1687
vs.)	Honorable Daniel P. Guerin Presiding
)	Order of Court August 4, 2014 and September 4, 2014
PEOPLE OF THE STATE OF ILLINOIS)	Order of Appellate Court June 29, 2017
)	
Respondent- APPELLEE-Plaintiff)	

REPLY BRIEF DEFENDANT-APPELLANT

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POINTS AND AUTHORITIES

**I THE JURY INSTRUCTIONS (AS GIVEN) ON CAUSATION WERE INCONSISTENT WITH THE
DRUG INDUCED HOMICIDE AND VIOLATED THE UNITED STATE CONSTITUTION**

- A. *This is a case of first impression for this Court as the Drug Induced Homicide statute is a distinct and unique homicide statute that this Court has never ruled on.***

Burrage v. United States, ___ U.S. ___, 134 S. Ct. 881(2014)

.....1, 5, 6, 8, 9

People v. Nere, 2017 IL.App (2d) 141143.....1, 5, 6, 7

People v. Santiago, 236 Ill.2d. 417, 431(2010).....2

People v. Diggins, 235 Ill. 2d 48, 55 (2009).....3

People v. Brackett, 117 Ill. 2d 170, 172-75 (1987).....3

People v. Lowery, 178 Ill.2d 462, 465 (1997).....6-7

People v Amigon, 239 Ill.2d. 71 (2010).....7

People v. Kidd, 2013 IL App (2d)

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- B. *Burrage interpreted a federal statute analogous to Illinois' Drug-induced homicide statute and did not address any other type of homicide case.***

State v. Bennett, 466 S.W.3d 5618

State v. Shorter, 893 N.W.2d 65, 71-74 (Iowa 2017)8

People v. ZuHui Li, 155 A.D.3d 571 (N.Y. App. Div. 2017)8

State v. Irish, 873 N.W.2d 161, 167 (Neb.2016)8

State v. Bacon, 2016 Ohio 6188

Rolf v. State, 472 S.W.3d 490 (Ark. Ct. App. 2015.)8

People v. Chapman, Nos. B257249 & B262234, 2016 WL 865690, *10 (Cal. Ct. App. Mar. 7, 2016)8

Castle v. Commonwealth, 2016 WL 4410098, No. 2014-CA-970-MR, *4-5 (Ky. Ct. App. Aug. 19, 2016)8

<i>Wallis v. Country Mutual Insurance Company</i> , 309 Ill.App.3d 566, (2nd Dist: 2000).....	9
<i>Paroline v. United States</i> , 134 S. Ct. 1710 (2014).....	9
<i>Blumenthal v. Brewer</i> , 2016 IL 118781,	9
<i>Lebron v. Gottlieb Memorial Hospital</i> , 237 Ill.2d. 217, 237(2010)	9
<i>Cates v. Cates</i> , 156 Ill.2d. 76, 80 (1993)	9
720 ILCS 5/9-1(a).....	2, 4
720 ILCS 5/9-1.2(a).....	2
720 ILCS 5/9-3(a).....	2, 4
720 ILCS 5/9-.3.3(a).....	2, 4
<i>Illinois Pattern Jury Instructions, Criminal, No. 7.15</i>	4, 6

INTRODUCTION

The State's assertion that defendant's interpretation of *U.S. v. Burrage*, 571 U.S. at __134 S.Ct. 881 (2014) (hereafter "*Burrage*.") requires but-for causation in all homicide cases is mistaken. This Court need not depart from *stare decisis*. First degree murder, second degree murder and reckless homicide all are decades-old homicide statutes that contain similar causation language. The causation language in those statutes is different than the causation language in the Drug-induced homicide and evidence a legislative intent to treat causation in Drug-induced homicide cases differently than in those statutes.

The United States Supreme Court interpreted a similar federal statute and rejected the arguments made by the Federal government, which were strikingly similar to the arguments advanced by the state in this matter. Moreover, the state's argument that *Burrage* has been rejected by state courts across the Country is without merit. Indeed, the Appellate Court in this case followed *Burrage* but then applied the wrong legal standard to evaluate the trial court's error. The state's failure to address the Appellate Court's opinion in this case speaks volumes.

I. The Jury instructions (as given) on causation were inconsistent with the drug induced homicide statute and violated the United States Constitution. *Burrage v. United States*, 134 S. Ct. 881(2014). ." *People v. Nere*, 2017 IL.App (2d) 141143 ¶107.

A. This is a case of first impression for this Court as the Drug induced homicide statute is a distinct and unique homicide statute that this Court has never ruled on.

The State claims that causation is the same in all Illinois homicide cases (St. Resp. 11). However, the State fails to take into account the differing histories and differing language of the various homicide statutes. The Drug-induced homicide statute was enacted into law in 1988. (St. Resp. 20). This was long after murder, voluntary manslaughter, involuntary manslaughter and reckless homicide had been adopted as criminal offenses. As for the causation language of the various homicide statutes, the language in the First Degree Murder statute is: “commits first degree murder if, in **performing the acts which cause** [emphasis added] the death.” 720 ILCS 5/9-1(a). The language in the Intentional Homicide of an Unborn Child statute is: “if, in **performing acts which cause** [emphasis added] the death of an unborn child” 720 ILCS 5/9-1.2(a). The language in the Involuntary Manslaughter and Reckless Homicide statute is: “if his acts whether lawful or unlawful which cause the death.” 720 ILCS 5/9-3(a). In contrast, the causation language in the Drug-induced homicide statute is: “any person's death is **caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance** [emphasis added]. 720 ILCS 5/9-3.3(a).

Where the legislature uses certain words in one instance and different words in another, a different result was intended. *People v. Santiago*, 236 Ill.2d. 417, 431(2010). It is clear that the causation language for Drug-induced homicide is different from other homicide statutes, and that death must be caused by the controlled substance that was delivered. This is “but-for” causation.

The Drug induced homicide statute is unique in other ways. It is the only homicide statute where the victim is always a “cause” of her own death. This is equally

true under all known instructions and interpretations and applications of “causation”—whether it be “but for causation” “contributing cause” or any other concept of causation that has been studied, contemplated and debated since our Constitution was adopted to guarantee the defendant’s right to be proven guilty beyond a reasonable doubt. Causation should be interpreted and applied in conjunction with the language of the specific statute with which the defendant is charged.

The State cites to the Senate debates on enactment of the Drug-induced homicide statute to claim that the legislature intended for the statute to have a broad application. (St. Resp. 13). However, the State cites to only part of the debates. Both Senator Jones, the Senate sponsor of the bill and Senator Geo-Karis spoke of the intent of the bill. Senator Jones said: “This bill is a very good bill. It get (sic) at the suppliers...” Senate Debates (June 24, 1988) at 95. Senator Geo-Karis stated: “It’s high time we go after these miserable drug pushers who’ve made a... travesty of the lives of young people.” Senate Debates (June 24, 1988) at 93. The intent was never to go after the users and addicts. Nonetheless, the attempt to determine the legislative intent from the debates is beside the point. Because the statute is clear and unambiguous, it must be interpreted “as written without resort to aids of statutory construction.” *People v. Diggins*, 235 Ill. 2d 48, 55 (2009).

Interestingly, the State argues that “the causation for all homicides in Illinois, except for felony murder, requires that the defendant’s acts ‘contributed’ to the victim’s death and that the death was not ‘unrelated’ to the defendant’s actions. Citing *People*

v. Brackett, 117 Ill. 2d 170, 172-75 (1987)” The state misses the point. Felony murder is an exception and has its own instruction because felony murder is a distinct form of homicide and the standard homicide instructions fail to properly instruct the jury. The additional language in IPI 7.15 follows the felony murder statute and instructs the jury consistent with the charge. Likewise, drug induced homicide is a separate statute with unique language and the standard causation instructions fail to properly mirror the statute and instruct the Jury.

The committee notes for IPI 7.15 says the “committee recommends that this instruction be given whenever causation is an issue under Section 720 ILCS 9-1(a) (intentional murder), 9-1(a)(2) (knowing murder), or 720 ILCS 5/9-3(a) (reckless homicide). However, when felony murder (720 ILCS 9-1(a)(3) is charged and causation is an issue, instruction 7.15A should also be given: “ the death of an individual results as a direct and foreseeable consequence of a chain of events set into motion by his commission of the offense of _____.” The committee makes no recommendation for drug induced homicide. Moreover, all of the instructions above- referenced defines criminal culpability as the “acts of the defendant.” Drug induced homicide does not.

IPI 7.15 mirrors the first degree murder statute and reckless homicide statute and talks about the “acts of the defendant.” No where does the drug induced homicide statute use the language “acts of the defendant.” Instead the Drug induced homicide statute reads “*by unlawfully delivering a controlled substance to another and any person’s death is caused by the injection, inhalation, absorption, or ingestion of any*

amount of that controlled substance. 720 ILCS 5/9-3.3. Drug induced homicide defines the “act” (delivering a controlled substance) and the specific cause (any person dies as a result of taking that specific drug.) There is no indication in the IPI committee notes that the committee has ever addressed causation as it relates to the drug induced homicide statute.¹ Nonetheless, the committee seems to consistently draft instructions that mirror the particular statute and charging document. IPI 7.15 does not follow the language of the drug induced homicide statute and the trial court here refused to modify it to make it consistent with the statute and the charging document. *People v. Nere, 2017 IL.App (2d) 141143 #109-111*

The State’s assertion that defendant asks this court to throw out 100 years of precedent is incorrect. Defendant requests that this Court do what it has always done: Apply the underlying constitutional principles that created the 100 years of precedent to a plain reading of the drug induced homicide statute. In this case, the Appellate Court recognized the constitutional deficiencies in the instructions and found that the trial Court improperly instructed the Jury: “We reiterate our concern that, using the ‘contributing cause’ instruction, a jury will convict a defendant of criminal homicide based on nothing more firm than a finding that her charged conduct’ made a positive incremental contribution, however small, to a particular result. *Burrage, 571 U.S.*

¹ Even if this Court declines to follow *Burrage*, the trial court at a minimum should have followed defendant’s request that IPI 7.15 be modified to read “the defendant’s act of delivering heroin” rather than defendant’s acts because that language allowed the jury to consider non charged conduct. (#39-42 Nere)

at__134 S.Ct. at 891. This does not appear to us to be an acceptable risk; it can be lessened or alleviated by a change in the instruction or perhaps, by changing the law of causation (statutory or judicial) on which instructions are based.” *People v. Nere*, 2017 IL.App (2d) 141143 #107.

The appellate court may have feared just as the state seems to, that applying the principles of due process to and interpreting the plain language of the drug induced homicide statute necessarily changes the definition of causation as it relates to other homicide statutes. “Therefore, we consider the case law behind IPI 7.15 (Supp. 2011), keeping in mind our basic inquiry: is the term ‘contributing cause’ any broader than the range of causation approved in *Burrage*—and, if so, is such a broad concept of causation undermined by *Burrage*—either as persuasive authority on statutory construction or as the source of *judicial dicta* on constitutional due process (proof beyond a reasonable doubt.)? *People v. Nere*, 2017 IL.App (2d) 141143 ¶85. “Whether these opinions (cited by the IPI committee) support the proposition that a ‘contributing cause’ can be something other than, either a but-for or one of multiple independently sufficient acts is difficult to say, in part because their reasoning is not always clear... *Id* ¶ 86

The Appellate Court should have limited the inquiry to the Drug induced homicide statute and this case. *Burrage* is not such an anomaly and unusual decision when it is read within the very unique confines of drug induced homicide. Because of its unique language, the Drug-induced homicide statute cannot be compared to other homicide statutes on the issue of causation.

Moreover, none of the cases cited by the state permitted the guessing and speculation and lack of proof beyond a reasonable doubt that concerned the United States Supreme Court in *Burridge* and that (as the Appellate Court found) occurred here. For example, *People v. Lowery*, 178 Ill.2d 462, 465 (1997) was a felony murder case in which the victim of an armed robbery ended up with the defendant's gun and accidentally shot an innocent bystander as the defendant fled. This court reaffirmed that Illinois adheres to a proximate cause analysis in felony murder cases and the defendant is guilty of murder if the victim's death is a direct and foreseeable consequence of the defendant's armed and attempted armed robberies. In *People v. Amigon*, 239 Ill.2d., 71, 75 (2010), Doctor Nancy Jones testified that: [the victim's] paralyzing gunshot injury was related to his development of pneumonia and subsequent death because the gunshot severely damaged his fourth cervical vertebra, affecting his lung function.. Specifically, she testified to a reasonable degree of scientific certainty that the cause of death was "pneumonia due to quadriplegia due to a gunshot wound to the neck. " 239 Ill.2d., at 76.

This Court has never defined causation with respect to the drug induced homicide statute. The State (citing *Kidd*) is overstating its position when it argues that the appellate court has consistently applied this Court's contributory causation standard from other homicide cases to drug induced homicide. (State response p. 13) The same court that decided *Kidd* decided this case and stated they never reached the issues raised here in *Kidd*. *People v. Nere*, 2017 IL.App (2d) 141143 ¶82. More importantly,

Burrage was decided four months after *Kidd*. The State conveniently ignores that the only post-*Burrage* case decided by the Appellate Court is this one. In *People v Nere*, the Appellate court correctly found that 7.15 (contributing cause) did not properly instruct the Jury. 2017 IL.App (2d) 141143 #77-79, 103, 107. The Appellate court simply failed to take the next step in the analysis and apply a harmless beyond a reasonable doubt standard to the error. Instead, they wrongly said they couldn't find that the trial court's error was an abuse of discretion. *Id* #107

B. *Burrage* interpreted a federal statute analogous to Illinois' Drug-induced homicide statute and did not address any other type of homicide case.

Defendant does not ask this Court to overturn this Court's homicide jurisprudence in general. Defendant simply asks this Court to follow *Burrage* in interpreting the drug induced homicide statute. As presented in defendant's PLA, *Burrage* interpreted an essentially identical federal statute. This Court should follow the same principles of statutory interpretation and apply the same constitutional principles of due process in interpreting the drug induced homicide statute.

The State argues that other state courts have recognized that *Burrage* is confined to the interpretation of a federal statute and is not a rule of constitutional dimension. (St. Resp., 15). However none of the cases cited by the State involved the interpretation of a statute comparable to Illinois' Drug-induced homicide statute. *State v. Bennett*, 466 S.W.3d 561 concerned a murder statute. *State v. Shorter*, 893 N.W.2d 65, 71-74 (Iowa 2017) also involved a murder statute. *People v. ZuHui Li*, 155 A.D.3d 571

(N.Y. App. Div. 2017) involved a manslaughter statute. *State v. Irish*, 873 N.W.2d 161, 167 (Neb.2016) involved a murder statute. *State v. Bacon*, 2016 Ohio 618 concerned felony murder. *Rolf v. State*, 472 S.W.3d 490 (Ark. Ct. App. 2015) is another murder case. *People v. Chapman*, Nos. B257249 & B262234, 2016 WL 865690, *10 (Cal. Ct. App. Mar. 7, 2016) and *Castle v. Commonwealth*, 2016 WL 4410098, No. 2014-CA-970-MR, *4-5 (Ky. Ct. App. Aug. 19, 2016) are unpublished opinions that are not recognized as precedent in their respective states. *California Rules of Court, Rule 8.1115* and *Kentucky, CR 76.28 (4) (c)*. If their own states do not consider them precedent, this court should not consider them precedent and should disregard them and strike them from the state's response. *Wallis v. Country Mutual Insurance Company*, 309 Ill.App.3d. 566, 572 (2nd Dist: 2000). Finally, *Paroline v. United States*, 134 S. Ct. 1710 (2014) involved the issue of restitution at sentencing after proof beyond a reasonable doubt had been found.

None of the cases cited by the State are applicable to this case. It would be speculation to conclude that these courts would have ruled in the same manner if they were interpreting statutes that were comparable to Illinois' Drug-induced homicide statute. In addition, this court is not bound to follow the decisions of any other state. *Blumenthal v. Brewer*, 2016 IL 118781, ¶182. Finally, even if the holding in *Burrage* did not rise to the level of a constitutional dimension the State has failed to address this court's respect for judicial dictum, *Lebron v. Gottlieb Memorial Hospital*, 237 Ill.2d. 217, 237(2010), and for obiter dictum from a court of last resort *Cates v. Cates*, 156 Ill.2d. 76,80 (1993).

C. Defendant is not asking this Court to depart from *star decisis* to redefine causation.

This Court should reject the State's false argument that interpreting the plain language of the drug induced homicide somehow reinterprets all other homicide statutes. There would be no need to enact a new statute if it was the same as another statute. Just as felony murder requires different jury instructions that are consistent with the felony murder statute and charging document, drug induced homicide requires instructions that mirror the drug induced homicide statute and charging document. IPI 7.15 did not do that in this case.

2. REASONABLE DOUBT

Defendant stands on her PLA with respect to reasonable doubt.

CONCLUSION

This Court should reverse defendant's conviction for drug induced homicide and find Jennifer Nere not guilty because the Jury instructions did not properly instruct the Jury and violated Ms. Nere's Constitutional right to be proved guilty beyond a reasonable doubt. Alternatively, Jennifer Nere requests that the verdict of guilty be reversed and the case remanded for a new trial with an order to instruct the Jury based on the applicable law outlined in defendant's PLA and this brief.

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Respectfully submitted,

Jennifer Nere

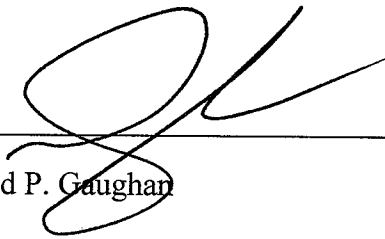
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CERTIFICATE OF COMPLIANCE

I, David P. Gaughan, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of the brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h) (1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a) is ~~10~~ pages.



David P. Gaughan